

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROLAND ALFRED BERRY,

Defendant and Appellant.

G055755

(Super. Ct. No. 99NF2770)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Steve Oetting and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

In 2000, Roland Alfred Berry, then 54 years old, was sentenced to a life term pursuant to the “Three Strikes” law, after he was convicted of possessing a fraudulent check and a forged driver’s license. This court affirmed his sentence in *People v. Berry* (June 30, 2003, G03062) [nonpub. opn.] (*Berry I*.)

When the Legislature amended the Three Strikes law in 2012, Berry filed a petition to recall his indeterminate life sentence (Pen. Code, § 1170.126).¹ The trial court determined Berry was ineligible because he was armed with a firearm during the offenses to which he pleaded guilty, although the firearm allegation was dismissed in conjunction with his plea agreement. A different panel of this court reversed the order, and remanded the matter for the trial court to reconsider the petition and determine if Berry posed an unreasonable risk of danger to public safety. (*People v. Berry* (2015) 235 Cal.App.4th 1417 (*Berry II*), overruled on other grounds by *People v. Estrada* (2017) 3 Cal.5th 661, 675.)

In 2017, the trial court again denied Berry’s petition, concluding Berry, a high-ranking member of the Mexican Mafia (also called EME), posed a danger to the public. Berry appealed, arguing the court abused its discretion. He maintained that although there was ample evidence showing the Mexican Mafia was a dangerous entity, there was no evidence showing his actions while incarcerated, or his status in the Mexican Mafia, established he would pose a danger to society. We disagree and affirm the order.

FACTS

Our prior opinions contain detailed summaries of the underlying facts. (*Berry I, supra*, G030627; *Berry II, supra*, 235 Cal.App.4th at pp. 1421-1422.) We incorporate those opinions by reference, and will repeat only those facts relevant to the issue raised in this appeal, i.e., whether Berry posed a danger to society.

¹

All further statutory references are to the Penal Code.

I. *Underlying Facts*

“While having a motel under surveillance, a police officer saw [Berry] walk to the rear of a black Cadillac, open its trunk, and reach inside. [Berry] then got into a Toyota, which had been stolen. [¶] The officers followed the Toyota and subsequently made a traffic stop and arrested [Berry]. Upon his arrest, [Berry] presented the officers with a California driver’s license that contained his photo, but showed his name as ‘James Alan Sinnena.’ Upon searching [Berry], the officers found a check payable to ‘James A. Sinnena’ and two credit cards, one in the name of ‘Tracy J. Sinnena,’ and the other in the name of ‘Sean E. Tannler.’ [Berry] admitted he intended to use the license and credit cards to cash the check. Using keys found in [Berry’s] pocket, one of the officers searched the Cadillac’s trunk and found a briefcase. It contained a loaded firearm and two baggies containing what appeared to be methamphetamine. While searching the motel room, which had been occupied by [Berry], the officers found more methamphetamine, drug paraphernalia, and another loaded handgun. (*Berry, supra*, G030627.)

The prosecutor and Berry reached a plea agreement. On the prosecution’s motion, the court dismissed the following counts: (1) possession of methamphetamine; (2) falsely identifying himself to a peace officer; (3) a felon in possession of a firearm; (4) possession of methamphetamine with a firearm; (5) a felon having possession of a concealed weapon in a vehicle; (6) a felon carrying a loaded firearm in a vehicle; and (7) a felon in possession of a firearm. (*Berry II, supra*, 235 Cal.App.4th at pp. 1421-1422.) “[Berry] pleaded guilty to counts 2 (possession of a fraudulent check) and 3 (possession of a forged driver’s license). He also admitted to the special allegations (three serious or violent prior felonies and two prison terms).” (*Id.* at p. 1422.) “The court denied [Berry]’s motion to strike his prior felony convictions and sentenced him to 25 years to life on count 2; the court stayed sentence on count 3 and struck the prior prison terms.” (*Ibid.*)

II. *The First Appeal*

Berry maintained the trial court erred in denying his motion to strike the prior serious felony convictions by (1) relying on the dismissal of the seven other counts, (2) considering the facts of an earlier arrest, and (3) failing to recognize the sentence violated the prohibition against cruel and unusual punishment. (*Berry, supra*, G030627.) We concluded the court properly considered facts relating to Berry's environment and his contentions lacked merit. (*Ibid.*)

In that appeal, we summarized Berry's lengthy criminal history as follows: "[Berry], who was 54 years old at the time of sentencing, ha[d] an extensive criminal record starting in 1964 and extending essentially continuously during all his adult life. At the time of his arrest he was out on bail after an arrest in San Bernardino County some five months earlier on charges of possession of methamphetamine for sale and possession of stolen firearms. His prior convictions included burglaries and bank robberies with the use of handguns. He completed a lengthy federal sentence approximately three years before the present crimes. [Berry]'s opening brief, which claim[ed] he had been out of prison for some eight years, [was] not supported by the record. It is true, he was released from the federal penitentiary on parole in 1991; but, four months later, he was found to have violated the conditions of his parole by using heroin and was returned to prison for four more years. While in the Orange County jail on the present charges, [Berry] was cited for 15 behavior problems, five of them major, including possession of heroin, his drug of choice." (*Berry, supra*, G030627.)

"The [trial] court was confronted with a person who had spent most of his adult life in prison, had been released only a few years earlier, and was out on bail for another alleged offense. And although [Berry] had demonstrated some 15 instances of behavior problems while in jail awaiting trial and sentencing, he now claimed he could live as a sober and productive member of society and only wished 'to "spend what's left of (his) life free of drugs and prison" so he could enjoy his children, grandkids and great

grandkids.’ Disregarding whether [Berry] was guilty of the crimes charged in the dismissed counts, the court properly noted that [Berry]’s ‘wallowing deep in the middle’ of criminal elements was inconsistent with this objective. And, ‘when I look at the totality of the circumstances here, there’s just a couple of things that just really don’t ring true about your sentiments as expressed to the probation officer about wanting . . . to free yourself from the criminal element’ The court did not base its refusal to strike the prior serious felony on an assumption that [Berry] was guilty of the crimes charged in the dismissed counts; rather, the court looked at the environment in which [Berry] had placed himself and the persons with whom he associated and properly concluded from these facts that [Berry]’s expressed intentions to turn away from his life of crime did not ring true.” (*Berry, supra*, G030627.)

III. *Petition to Recall Sentence*

Berry filed his petition to recall his sentence in April 2013. (*Berry II, supra*, 235 Cal.App.4th at p. 1422.) The court determined he was ineligible for the recall, an order this court reversed in *Berry II*.

On remand, the trial court held a hearing to determine if Berry, who met the basic eligibility requirements for recall, would pose an unreasonable risk of danger to public safety if he were released from prison in accordance with section 1170.126, subdivision (f). (*Berry II, supra*, 235 Cal.App.4th at p. 1429.)

A. *The Prosecutor’s Case*

The prosecutor’s written opposition to Berry’s opposition asserted “Berry, a.k.a. ‘Rollo,’ [was] an active, high profile and high ranking member of the Mexican Mafia (EME) gang.” The prosecutor argued Berry’s arrest record dated back to 1964. “‘By [Berry’s] own admission, the genesis of his problems stems from his addiction to heroin which began when he was only 15 years of age’ and led him to a life not only of narcotic offenses, including drug sales, but also to gang membership and a propensity to possess and use dangerous weapons.”

The prosecutor presented evidence showing Berry was an active Mexican Mafia gang member. For example, in March 2014, the prison cited Berry with a rules violation for “gang activity” because he was caught giving orders to “subordinate Mexican Mafia associates” using paper notes (also called “kites”). Moreover, from January 2012 through August 2015, the California Department of Corrections and Rehabilitation (CDCR) stopped 39 mail messages from reaching Berry because they contained “coded messages” promoting gang activities. The prosecutor asserted this evidence proved Berry was actively participating, and held a senior leadership role, in the Mexican Mafia crime network.

Additionally, the prosecutor presented evidence the prison staff classified Berry a threat to himself and others. Until “recently,” Berry was kept segregated from the general prison population and housed in a single cell, without a cellmate at Pelican Bay State Prison. In 2005, Berry explained why he did not want a cellmate, saying “I’m 59 years old and set in my ways. I have never had a cellie [*sic*] and don’t know if I would be compatible with anyone.” He added, “If you guys give me a cellie [*sic*] that I’m not compatible with and he starts acting like a fool, you guys will be carrying his body out of the cell.” The prosecutor concluded nothing had changed since the time of his third strike conviction to render Berry less of a danger to society.

The prosecutor had three experts testify about the Mexican Mafia and Berry. As Berry noted, each expert testified about their general experiences with the Mexican Mafia’s activities and culture. While somewhat repetitive, these experts provided important insight into the power, reach, motives and respect demanded by Mexican Mafia’s members.

Los Angeles Police detective, Isidro Rodriguez, testified he was formerly a member of the gang unit and worked with the Mexican Mafia task force from 2000 to 2005. He explained the Mexican Mafia formed in 1957 by several gang members serving prison terms, who felt they needed to protect themselves against other ethnic prison

groups. The gang soon became a much larger criminal organization, controlled by approximately 150 members. “Every Hispanic gang member in southern California pledges an allegiance to the Mexican Mafia” and “everybody wants to aspire to climb the ladder to become a Mafia member.” The Mexican Mafia members use thousands of younger gang members, referred to as “Sureños” to work as the “soldiers for the Mexican Mafia.” These foot soldiers give the organization strength and are the reason why a small group of leaders can control numerous county jails, state prisons, and state hospitals. The Sureños are “willing to do whatever they’re asked to do; whether it be kill, extort, [or] beat [others].” Rodriguez testified the Sureños believe in and respect the older Mexican Mafia members, and will sacrifice themselves by committing crimes that make them stay in prison longer, while the Mexican Mafia members make a financial profit.

Rodriguez described how the Mexican Mafia members generated money outside and inside of jail/prison. The main activities while incarcerated involved extortion, drugs, and prostitution. He explained, a Mexican Mafia member acts like a “franchise” with younger inmates acting at his direction, sending out orders to kill on his behalf or sending different inmates to be in control of areas. The orders get out by using kites or through jailhouse visits. “If the [Sureño does] not commit that act, then they, themselves, have opened themselves up for being assaulted or killed for failing to obey a Mexican Mafia order.” Rodriguez clarified it was rare that a Mexican Mafia member has to perform any criminal acts himself, because the younger gang members will do whatever they say.

Rodriguez stated his information about Berry being an “elder statesmen” of the Mafia was based on his conversation with “Sergeant Valdemar” and an article Valdemar wrote. He opined, “[A] person of . . . Berry’s stature would have no trouble finding willing participants or followers or people who would idolize him or do anything that he asked.”

Rodriguez testified he consulted with other people to get an update on Berry's level of participation in the Mexican Mafia. He spoke with Jason Salinas, an "institutional gang investigator" at the Men's Colony Prison in San Luis Obispo. Salinas confirmed Berry was an active Mexican Mafia member, and provided additional information and photographs. The pictures confirmed Berry had tattoos associated with the Mexican Mafia. Salinas recalled one conversation when he asked Berry what he was doing in the Men's Colony Prison. Berry replied, "I'm squatting for young Hispanics," which Salinas took to mean that Berry was recruiting a "crew" to get organized.

Salinas told Rodriguez that when Berry arrived at Men's Colony Prison, which was a lower-level security prison, things quickly changed. He explained the prison had a reputation for housing sex offenders and informants and the prison provided these prisoners with a less structured environment than criminals having a higher classification or who were convicted of more serious criminal offenses. After Berry arrived, Salinas noticed the prison population became more structured. "There were certain groups associating just in different ways, not that they had seen before; where before you just saw people meandering all about. [¶] What I'm talking about specifically is the exercise yard or the field that's within the prison. Before, you would see people meandering, walking around; now, all of a sudden, you saw certain groups . . . organized and regimented." Salinas said before Berry's arrival the Sureños, who were informants and sex offenders, would be assaulted by the Mexican Mafia after transferring to a different prison. Berry "validated" the prison, meaning the Sureños were deemed to be in good standing with the Mafia and would no longer be attacked.

Salinas told Rodriguez that he saw the younger inmates showed Berry a great deal of respect in the prison yard, and they would take care of him. They gathered around him, and Berry "programmed" and organized them by giving them rules on how to conduct themselves. After Berry left the prison, Salinas noticed there was in-house fighting to determine who would be in charge of the prison in Berry's absence.

Rodriguez opined Berry had significant status in the Mexican Mafia due to the evidence he recruited young members, he validated and organized prison populations, and he took specific actions on the prison grounds. In addition, this conclusion was supported by the nature of Berry's tattoos. Based on his training and experience, Rodriguez believed all active Mexican Mafia members gave orders that resulted in criminal activity.

The second expert witness, John Clark, worked as a deputy sheriff and was currently assigned to the major crimes bureau, prison gang unit. He had been investigating the Mexican Mafia for approximately four years. Clark also spoke with Salinas and heard the same information about Berry's influence and validation conduct at the Men's Colony Prison. In addition to repeating much of the information conveyed by Rodriguez, Clark testified about a Mexican Mafia member's level of influence if they are released from prison. He explained a Mexican Mafia member, who no longer had to comply with prison rules, would have an easier time communicating orders and exerting his influence. Based on his review of the prison rule violation reports, information from Salinas, and photographs of certain tattoos on Berry's body, Clark opined Berry was a high-ranking Mexican Mafia member who would be a danger to the public for two basic reasons. First, Berry had the ability to command Sureños to engage in criminal conduct, and second, he had power to intimidate the community.

The third expert was Christopher Brandon, an investigator for the Los Angeles County Sheriff's major crimes bureau, prison gang unit. He explained one of the prison gangs he investigated was the Mexican Mafia, responsible for crimes such as murder, kidnapping, extortion, narcotics trafficking, and illegal gun running. He investigated Mexican Mafia members who were both incarcerated and out of prison. He estimated there were approximately 150 to 200 "brothers, the *Carnals*" who viewed themselves as nobility and had the power to direct thousands of other gang members (Sureños) to engage in criminal activity. He had the same opinion as Clark, that a

“brother” not incarcerated was more beneficial to the Mexican Mafia because he is “not under the direct scrutiny of law enforcement monitoring phone calls, monitoring his letters, monitoring his visits, monitoring everything that he does and keeping a lid on it.” He explained there was more of a risk the Mexican Mafia member would be able to use fear and intimidation to direct criminal activity.

Brandon testified he had “heard of” Berry and was unaware of any request to disassociate from the Mexican Mafia. He knew of other Mexican Mafia members who continued to commit crimes after they were released from prison. He opined Mexican Mafia members were dangerous because “they’ve set themselves up as a very influential person with a lot of respect” from other gang members. He explained, “So they have the ability to say things to get things done just by word of mouth, just by a letter, just by a kite, just by a phone call. That’s the danger.” He concurred with the other two experts that senior Mexican Mafia members do not commit the crimes themselves.

B. The Defense Case

Delores Canales, an advocate for California Families Against Solitary Confinement, Family Network of Incarcerated Families, and the Anti-Recidivism Coalition, testified she and Berry had been in contact since 2011. She testified the Anti-Recidivism Coalition could provide Berry with reentry Programming (employment and other resources) if he were released.

Berry provided the expert opinion of Daniel Vasquez, a “correctional expert consultant” who retired after working 30 years for the California Department of Corrections (CDC). He worked as a parole agent and a special agent with the CDC investigating prison gangs. He was a founding member of the prison gang task force and eventually promoted to warden of several prisons, including San Quentin State Prison, a position he served for 10 years.

When working as a special agent for the CDC, Vasquez gathered intelligence information about the Mexican Mafia and their criminal activities.

He was also involved in inmate classification, which took into account the crime, the criminal history, past sentencing, level of membership in a gang, past prison disciplinary action, and social history.

Vasquez discussed Berry's classification as an inmate. He explained the Institution Classification Committee (the committee) reviewed Berry's classification sometime after August 31, 2015, pursuant to an updated review policy. Vasquez opined this was unusual because ordinarily the Departmental Review Board would evaluate an inmate with a gang history. The committee recommended Berry be reclassified and transferred from SHU in Pelican Bay to the general population at California Men's Colony in San Luis Obispo County.

Vasquez testified Berry was "validated" as a gang member in 2014. Validation requires three independent sources all showing Berry had a connection to gang activities. Vasquez noted one of the source items used to validate Berry was evidence he possessed a roster of incarcerated gang members, listing their monikers, their prison numbers, and where they were housed. He explained inmates were generally not allowed to have rosters because the list would help them communicate with other gang members, putting at risk the safety and security of the prison. However, in Berry's case, he legally possessed the document because it was part of the legal pleadings in a civil case produced by the Sacramento District Attorney's office. The district attorney filed a lawsuit and the inmates on the roster received money that had been seized and placed in a trust account. Vasquez opined this document was not a proper source to identify Berry as a gang member because he lawfully possessed the document.

Vasquez stated the second source was Berry's possession of Aztec artwork in his cell. He explained inmates draw and distribute Aztec symbols as a way to recruit new members to the Mexican Mafia. Vasquez stated Berry's artwork was found in his single cell, where other inmates were not allowed visit. He opined the document was not

a proper source because “everybody in that SHU [was] validated” and there was nobody to recruit.

The third source was a birthday card, signed by SHU inmates who were validated gang members. He opined the card did not represent gang activity and should not have been used to validate Berry. Another source linking Berry to gang-related activity was evidence an inmate in a different cell possessed a kite or another form of written communication having Berry’s name. Vasquez stated this evidence should not be considered a source because there was no evidence Berry contacted the inmate.

Vasquez stated Berry’s classification was based on a range of points. When Berry started his life sentence, his score was a 66 or 68 (19 points are given for the life sentence). After 17 years, Berry’s score dropped “dramatically” to 24 points. Vasquez explained the score gradually decreases each year when there is no evidence of disciplinary issues, assaults, or gang activity. Vasquez opined it was unusual to see a significant drop in classification scores when the inmate was a validated gang member. He did not see any information in Berry’s central file that indicated he engaged in illegal activity during his sentence. Vasquez added he saw a memo indicating Berry was willing to have a cellmate, but explained he was in a single cell for 20 years in a federal penitentiary and his preference was to stay in a single cell. Berry had a double cell when he was at Corcoran prison. According to Vasquez, the prison documents that stated Berry was a “threat to the safety and security of the institution and other inmates” was simply “boilerplate” language always included by the Pelican Bay prison authorities when referring to a validated gang member. Vasquez opined the “threat to the safety” language was inconsistent with Berry’s classification score.

C. Trial Court Ruling

The court stated that before ruling it considered the recent California Supreme Court decision *People v. Valencia* (2017) 3 Cal.5th 347 (*Valencia*), the factors listed in section 1170.126, subdivision (g), and all other factors allowed by law. It noted

Berry's extensive criminal record, dating back to 1964, had been summarized in the prior appellate decisions and did not need to be repeated in detail. It noted Berry's three strikes offenses reflected a history of possessing loaded guns and knives that indicated a pattern of criminal sophistication and professionalism. "[Berry's] disposition to continue to commit the type of crimes he has been convicted of in his criminal history when he is not incarcerated is very apparent from the record and suggests that he's likely to re-offend."

The court was also persuaded by the evidence showing Berry was a validated active member of the Mexican Mafia prison gang and deemed a threat to the safety of others and the security of the prison. It referred to the documents showing Berry's influence as a senior member of the Mexican Mafia gang while incarcerated. His prison records showed rule violations for gang activity, and there was evidence "clearly show[ing] . . . behavior of sophisticated, professional[,] and coordinated efforts to continue to give orders to subordinate Mexican Mafia associates with the assistance of other [Mexican Mafia] members to continue to engage in criminal activity." It concluded Berry's status as an active and senior member of the gang gave "him ultimate authority as to the inner workings of inmate life including but not limited to authorizing gang assaults and/or other criminal activity that is dangerous to the safety of others including corrections staff."

The court determined there was evidence proving Berry, despite his age, was the senior shot caller of the institution "and thereby controls illegal criminal activity." The court found very telling Berry's history of being segregated from the general prison population and his incarceration at California maximum-security prison, Pelican Bay. The court referred to Berry's threat to harm anyone forced to be his roommate. "It is important to note that as a high ranking senior member of EME he has been able to insulate himself by numerous layers of subordinate and associate members who do the personal 'dirty' work [for him] and EME. However, such insulation does not

absolve him of criminal culpability. The evidence indicates that his gang related associations and activities will continue on long past any release date.”

The court stated it did not find Canales’s testimony to be credible, compelling, or particularly assuring Berry could lead a crime free life when no longer incarcerated. It also did not find credible Vasquez’s testimony, despite his 30 years of experience with CDC. The court stated, “The foundation for much of his testimony was lacking a reliable, complete, and credible basis. His opinions were speculative, lacking foundation, old, antiquated and lacked confidence and credibility in the manner in which he testified as to the basis for his opinions.” On the other hand, the court found credible Rodriquez’s testimony. It noted this expert testimony was supplemented and corroborated by Clark and Brandon.

The court concluded as follows: “[Berry’s] criminal history and the fact that he has served a substantial portion of his life in prison clearly shows that rehabilitation or the ability to live as a law-abiding citizen in society is not foreseeable. Unlike the picture presented of an older man whose criminal days were over and he just wants to retire and live a happy peaceful life in Arizona, [Berry] is unlikely to be able to live a life free from gang related criminal activity, drug abuse, and/or weapon offenses, and will continue to pose an unreasonable risk of danger to public safety. [¶] In conclusion, the court finds that the People have met their burden by a preponderance of the evidence that [Berry] poses an unreasonable risk to public safety and if he is released, he would find his way into the community, pose an unreasonable risk of danger to public safety, and continue his criminal behavior.” The court denied the petition for recall of the sentence.

DISCUSSION

I. Proposition 36

The Three Strikes Reform Act of 2012 (Proposition 36) “amended the Three Strikes law with respect to defendants whose current conviction is for a felony that

is neither serious nor violent. In that circumstance, unless an exception applies, the defendant is to receive a second[-]strike sentence of twice the term otherwise provided for the current felony [¶] . . . [¶] In addition to reducing the sentence to be imposed for some third[-]strike felonies that are neither violent nor serious, [Proposition 36] provides a procedure by which some prisoners already serving third[-]strike sentences may seek resentencing in accordance with the new sentencing rules. (§ 1170.126.) . . . In contrast to the rules that apply to sentencing, . . . the rules governing resentencing provide that an inmate will be denied recall of his or her sentence if ‘the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ (§ 1170.126, subd. (f).)” (*People v. Johnson* (2015) 61 Cal.4th 674, 681-682.)

Factors a trial court may consider in exercising its discretion under section 1170.126 subdivision (f), include a defendant’s criminal conviction history, his disciplinary record and record of rehabilitation while incarcerated, and any other evidence the trial court determines is relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety. (§ 1170.126, subd. (g).) “Thus, as the Legislative Analyst explained in the Voter Information Guide, ‘[i]n determining whether an offender poses [an unreasonable risk of danger to public safety], the court could consider *any evidence* it determines is relevant, such as the offender’s criminal history, behavior in prison, and participation in rehabilitation programs.’ [Citation.]” (*Valencia, supra*, 3 Cal.5th at p. 354.)

II. Analysis

Berry maintains the trial court abused its discretion in denying his Proposition 36 petition. We review a trial court’s exercise of discretion under section 1170.126, subdivisions (f) and (g), for an abuse of discretion. (*Valencia, supra*, 3 Cal.5th at p. 354; *People v. Buford* (2016) 4 Cal.App.5th 886, 894-895.) A trial court abuses its discretion when the “ruling in question ‘falls outside the bounds of reason’ under the

applicable law and the relevant facts” (*People v. Williams* (1998) 17 Cal.4th 148, 162.) Berry asserts the trial court abused its discretion for the following three reasons: (1) there was insufficient evidence Berry was a member of the Mexican Mafia; (2) the prosecution experts’ testimony provided only general opinions about the Mexican Mafia, which was insufficient to prove Berry was a danger to society; and (3) Berry’s disciplinary record in prison was minor and he had not assaulted anyone in prison for the past 16 years. We find no abuse of discretion.

Turning to Berry’s first contention, we reject his argument the court improperly relied on two sources to support its conclusion Berry was a member of the Mexican Mafia. Berry maintains it was improper for the court to rely on the prosecution’s expert witnesses because they had no personal knowledge of Berry’s gang affiliations. He claims it was also error to rely on the CDC’s investigation and conclusion he was a member of the Mexican Mafia. We disagree.

As noted by the Attorney General, the purpose of the prosecution experts’ testimony was not to establish gang membership, but to provide insight into how the Mexican Mafia was structured and operated inside the prison. The three experts agreed senior members of the Mexican Mafia use Sureños to carry out their orders and commit crimes. The testimony provided context as to why Berry, a senior member of the Mexican Mafia, had not assaulted anyone in prison and offered insight as to why he would be a danger to society if released. We conclude the court reasonably relied on this evidence for its intended purpose.

The prosecutor presented other evidence to prove membership. Indeed, the prosecutor submitted six exhibits, which related to Berry’s active membership, in support of her opposition to the petition (exhibit Nos. 3-8). Exhibit No. 3 contained two reports, written by Pelican Bay prison gang investigators. The first report issued in March 2014, stated that in February 2001, Berry was validated as a member of the Mexican Mafia prison gang, and a subsequent investigation in March 2014, confirmed this finding. The

investigators, part of the Institutional Gang Investigations Unit (IGI), explained the IGI relied on four confidential “source items” and determined Berry (having the moniker Rollo from Watts) was a member of the Mexican Mafia prison gang. The second report, issued in August 2008, also reviewed the 2001 gang validation. This report contained summaries of the confidential source items considered by the IGI investigators before concluding Berry was an active member of the Mexican Mafia. In summary, exhibit No. 3 established prison authorities validated Berry as an active gang member in 2001, 2008, and 2014.

Berry challenges the relevancy of the 2014 source documents because the source items/confidential memorandum were not disclosed to the trial court and he provided written responses to two of the source documents. He complains two of the confidential source documents related to evidence he possessed a gang roster and an address book containing addresses of Mexican Mafia members. He argued the roster was a legally possessed court document, and his possession of the address book did not break any prison rules.

While the details of the confidential memorandum were not part of our record, we conclude the trial court had sufficient evidence of Berry’s current gang status from other evidence in the record (in addition to the gang roster and address book). For example, exhibit No. 3’s IGI report prepared in 2008 included detailed descriptions of the source documents relating to Berry’s gang membership.

The first source document related to a confidential memorandum dated January 3, 2008. The summary of that memorandum was as follows: “[It] identifies [Berry] as having written, and sent a note or kite, to a validated EME associate in Corcoran State Prison (COR). The note was informing the recipient and all other EME affiliates at COR of a situation, that an EME member’s wife was putting out a hit (targeting an individual for assault) on a validated EME member on parole. [Berry] wants the opinion of all EME affiliates at COR on this situation. By [Berry] contacting

an EME associate at another prison of a possible situation between an EME member's wife and an EME member on the streets, [it] shows that [Berry] is participating in EME gang-related activities.”

The second source document related to a confidential memorandum dated February 10, 2008. The summary of this memorandum was as follows: “[D]uring an unclothed body search of a nonvalidated EME associate, EME gang-related notes or kites were discovered. In the notes were code names of prisons throughout the [s]tate and also names, monikers, and where individuals came from on the streets. In the note was the name ‘Rolas.’” The summary stated Berry’s moniker was on the roster with other validated EME members, showing he was still active and considered to be in “good standing” with the EME.

The third source document related to a confidential memorandum dated March 26, 2008, and related to an “inmate-manufactured birthday card” in a validated Mexican Mafia associate’s cell. Sixteen validated Mexican Mafia members, including Berry signed the birthday card. Inmates of different races belonging to other gangs did not sign it. The investigators concluded that signing a card for a validated Mexican Mafia associate indicated Berry was participating in Mexican Mafia gang-related activities by associating with validated gang members.

The fourth source confidential memorandum concerned a body cavity search of a nonvalidated Mexican Mafia associate at Kern Valley State Prison (KVSP) on March 21, 2008. Prison authorities found a plastic wrapped bundle of Mexican Mafia gang-related notes or kites. The kites referred to Berry and other Mexican Mafia members who had control and authority of the Sureños “on Facility B and Administrative Segregation Unit at KVSP.” The kites informed the recipients about how to contact Berry through his “secretary” at COR. “By the author informing the recipient that [Berry] is sharing control and authority of Facility B at KVSP, shows that [Berry] is actively participating in EME gang-related business and activities.”

The IGI's report included three other documents supporting the conclusion Berry was a member of the Mexican Mafia. During a property search in 2008, when Berry was transferred from COR to Pelican Bay prison, officials found two documents that related to gang activity. There was a photograph, dated December 14, 2004, which depicted a validated Mexican Mafia member, who was currently housed in the federal bureau of prisons in Colorado. The federal inmate was holding two drawings, one containing symbols utilized by the Mexican Mafia. There was also a photocopy of an "inmate-manufactured drawing depicting an Aztec collage with many Aztec symbols and people." The photocopy and photograph each depicted an outward facing, open hand with the "Mano Negro" symbol, also referred to as the black hand of death. It is a symbol most commonly utilized by the Mexican Mafia membership "to identify oneself as a member of the prison gang."

Exhibit No. 4 disclosed a copy of Berry's 2014 prison housing notification, listing the reasons why Berry was being housed in "PBSP Security Housing Unit (SHU)." The notice explained Berry required SHU housing due to his 2008 validation as an active member of the Mexican Mafia "Security Threat group." Berry refused to sign the notification.

Exhibit No. 5 included a 2015 "classification committee chrono" regarding housing. The report noted Berry was present during this annual review. The committee determined he was a medical high risk but he would remain in the SHU because he posed "a threat to the security of the institution"

Exhibit No. 6 disclosed a prison rule violation report and prison disciplinary hearing record. The report, prepared in March 2014, concerned an IGI officer's investigation of several kites possessed by a validated Mexican Mafia member. A prison officer discovered a small bindle after it fell from an inmate's towel as he was escorted to the shower. The bindle contained multiple kites. The investigator determined the inmate was forwarding Berry's orders to other members of the Mexican Mafia. He

reported as follows: “[Berry’s] orders to validated associates of the Mexican Mafia [were listed in four of the notes]. Three of the four notes/kites were authored by separate inmates. Each note/kite . . . speaks about [Berry] giving orders to his subordinate Mexican Mafia associates about how they are to conduct themselves within the Step Down Program and how they are to get permission from a member of the Mexican Mafia prior to another Mexican Mafia associate assaulted. The contents of the four notes/kites corroborate each other and further corroborated that [Berry] did give orders for Mexican Mafia associates to follow. In addition, [Berry’s] CDC . . . movement history further corroborates the time line in which [Berry] gave the orders. . . . These notes/kites were rolled into small bindles in order to make the detection of each . . . difficult for correctional staff to discover. The notes/kites were also identified as being transferred from various [h]ousing [u]nits throughout Facility B to Housing Unit #3, which would require a great amount of sophistication in hiding and transporting the notes/kites through a network of individuals. These notes/kites were never intended to be viewed by correctional staff and are sensitive information to the Mexican Mafia organization.”

In the report, the investigator noted the fourth kite referred to Berry as “THE SEN ROL DE WATTS” and the letters “SEN” was an abbreviation for the word senior. “Mexican Mafia associates often refer to member[s] of the Mexican Mafia as ‘seniors’ in order to show respect and identify the person they are referring to as a person in a position of high ranking authority.” Moreover, the investigator stated a reliable confidential informant provided information that Berry was forwarding orders to another Mexican Mafia member when he was “on Out to Court Status.” The disciplinary hearing, containing the same information as the report, showed Berry pled not guilty to the charges. The correctional lieutenant found Berry guilty of gang activity, and assessed the punishment of a 30-day credit forfeiture for the offense.

Exhibit No. 7 shows that between January 2012 and August 2015, the CDC’s IGI stopped 38 items of correspondence from reaching Berry. The officials

confiscated the incoming mail because the messages contained coded messages that promoted gang activity and violated prison rules.

The prosecutor's five exhibits amply supported the trial court's conclusion Berry was an active and senior member of the Mexican Mafia. Once this fact was established, the court could reasonably rely on expert testimony showing why the release of a senior member of the Mexican Mafia would pose an unreasonable risk of danger to society. We conclude the trial court did not abuse its discretion because the record shows it considered Berry's lengthy criminal history, commitment offenses, prison disciplinary record, lack of rehabilitative programming, gang activity, and the weaknesses of his post-release plans in reaching its conclusion Berry posed an unreasonable risk of danger to public safety.

Berry suggested the court should not have overlooked the fact he was living a peaceful nonviolent life. Specifically, the lack of prison reports suggested he was neither violent nor ordered anyone else to commit illegal or violent acts. This argument ignores the expert testimony showing senior Mexican Mafia members often appear to live nonviolent lives because of their tradition of ordering younger members to carry out assaults and illegal acts. Berry's most recent prison violation report substantiated the expert testimony that Berry has control over other EME members by using sophisticated communication channels in the prison. The experts testified a senior member having a large sphere of influence while incarcerated would be more dangerous if released.

Berry minimizes the importance of his Mexican Mafia gang tattoos, arguing any attempt to remove the tattoos "would jeopardize his life." He notes the experts agreed Mexican Mafia members would be murdered if they tried to become inactive. This argument suggests Berry recognizes he will always be a Mexican Mafia member. It does not support his claim he no longer poses a danger to the public.

Berry discusses favorable evidence presented by his own expert minimizing the relevance of Aztec artwork, a Mexican Mafia birthday card, and SHU housing

classifications. However, our role is not to examine Berry's evidence or offer him a de novo hearing on his petition. The trial court determined Vasquez's testimony was speculative and lacked credibility. We have no reason to second-guess this conclusion. Moreover, there was overwhelming evidence supporting the trial court's determination about Berry's dangerousness that outweighed Berry's favorable evidence.

Finally, Berry faults the trial court for focusing on a comment he made about not wanting a cellmate. Berry asserts his threat to harm a future cellmate was speculative evidence he was currently capable of violence. The statement was made more than 10 years ago and he had not assaulted anyone in the past 16 years. We might agree with this argument if the stale threat was the only evidence of Berry's dangerousness. It was not. As described in detail above, Berry was in fact an active senior member of a violent prison gang, known to use younger members to carry out assaults and illegal acts.

Given this evidence in the record, the trial court properly concluded there was an unreasonable risk of danger to public safety if Berry was resentenced under section 1170.126. The trial court's ruling did not fall outside the bounds of reason.

DISPOSITION

The order is affirmed.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.